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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 561

NATIONAL AIRLINES, INC., a Corporation,
Petitioner

v.

CIVIL AERONAUTICS BOARD, *Respondent*

and

EASTERN AIR LINES, INC.
COLONIAL AIRLINES, INC.
Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN W. CROSS
CLAYTON L. BURWELL
920 Southern Building
Washington, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States.

The Petition prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on September 15, 1955.

OPINION BELOW

No opinion was filed by the Court.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was dated and entered on September 15, 1955 (App. C). The jurisdiction of this Court is invoked under Section 1254(1), 28 U.S.C.; and Section 1006(f), Civil Aeronautics Act of 1938, as amended.

QUESTION PRESENTED

Whether a proper construction of section 801 and 1006 of the Civil Aeronautics Act of 1938, as amended, forbids judicial review of violations by the Civil Aeronautics Board of procedural requirements of the Civil Aeronautics Act and the Administrative Procedure Act prior to a consideration by the Board or decision by the President of the merits; and if a proper construction does forbid such judicial review whether sections 801 and 1006 of the Civil Aeronautics Act of 1938, as amended, are unconstitutional as an undue delegation of legislative power by Congress to the Executive and as a denial of due process of law to this petitioner.

STATUTES INVOLVED

The Act of June 23, 1938 C. 601, 52 Stat. 977 and the Act of June 11, 1946 C. 324, section 2 et seq., 60 Stat. 237 are involved as well as ART. 1, Sec. 8; ART. 1, Sec. 1 and AMENDMENT V to the U. S. Constitution. The pertinent statutory and constitutional provisions are printed in Appendix, infra (App. A and B).

STATEMENT

Petitioner, National Airlines, and Intervenor, Eastern Air Lines, are bitter rivals for the airline traffic between the Eastern seaboard and Florida. In order to broaden the area from which Florida traffic could be generated and served without a change of planes, petitioner commenced negotiations in the latter part of 1951 with Colonial Air Lines to acquire the assets of Colonial Air Lines. Thereafter Eastern defeated a National-Colonial integration by gaining illegal control of Colonial.

On July 24, 1952, Eastern and Colonial filed with the Civil Aeronautics Board as required by Sections 408 and 412 of the Civil Aeronautics Act, a joint application for approval by the Civil Aeronautics Board of an agreement by which Colonial's assets would be acquired by Eastern. Public hearings were held in Consolidated Dockets 5569 and 5666. The Board's recommended decision was submitted to the President for approval in accordance with section 801 of the Civil Aeronautics Act since the assets of Colonial included a foreign route from New York to Bermuda and Montreal. The President disapproved the agreement because of a finding of the Board and the President that Eastern had secured unlawful control of Colonial in violation of Section 408 of the Act. On February 26, 1954, the Board issued a decision ordering that the joint application of Colonial and Eastern for approval of their agreement dated July 18, 1952 "be and hereby is disapproved". The President approved this order February 27, 1954, thereby terminating Consolidated Dockets 5569 and 5666.

Docket 6582 to ascertain whether Eastern still maintained illegal control of Colonial culminated in a three

to two opinion of April 29, 1955 by the Board that Eastern did not control Colonial as of December 30, 1954.

On February 3, 1955, a new joint application was filed by Colonial and Eastern, Docket No. 6998, as required by sections 408 and 412 of the Act for approval of another agreement dated January 28, 1955 covering acquisition by Eastern of the assets of Colonial.

On June 28, 1955 the Board issued Order No. E-9347 in Docket No. 6998 upholding the Examiner's ruling which excluded the statutory issues of public interest, violation of the Act and monopoly required by section 408 of the Act.

Petitioner filed a petition for Judicial Review of said Order No. E-9347 with the U. S. Court of Appeals for the District of Columbia Circuit. The Court ordered the dismissal of the Petition for Judicial Review on September 15, 1955, with no opinion. (App. C). This petition is for review of the Court's refusal to review the Board's order when it is given jurisdiction by Section 1006(a) of the Civil Aeronautics Act of 1938, as amended (49 U.S.C. 646(a)).

REASONS FOR GRANTING THE WRIT

In the absence of an opinion by the Court of Appeals it is presumed that it dismissed the Petition for Judicial Review based upon the Court's interpretation of the case of *Chicago and Southern Airlines* v. *Waterman Steamship Co.*, 333 U.S. 103, as forbidding judicial review of any order of the Civil Aeronautics Board pertaining to a proceeding involving a foreign route transfer requiring Presidential approval under Section 801 of the Civil Aeronautics Act.

In support of this presumption see *United States Overseas Airlines* v. *Civil Aeronautics Board,* 222 F. 2nd 303.

It is also presumed that the Court sustained the constitutionality of sections 801 and 1006 of the Act under the authority of *Colonial Airlines* v. *Adams, et al,* 87 Fed. Supp. 242; 338 U.S. 942; 338 U.S. 947.

The Circuit Court's decision is not limited to the ratio decidendi but is based upon an extreme view of the dicta of Mr. Justice Jackson speaking for the majority of 5 to 4 in the Waterman Case (supra). The Waterman decision is distinguishable from the instant case. See Answer of Petitioner to Respondent's Motion to Dismiss. The decision of the Court of Appeals stretches the application of the Waterman doctrine in a way that affects vitally the most important part of the U. S. aviation transportation system. At present, Pan American, United American, Eastern, National, Colonial, Delta-C&S, Braniff, T.W.A., Northwest, Western, Northeast and Seaboard and Western Airlines, all have foreign routes. In Alaska alone there are eleven additional airlines in overseas transportation likewise affected by the case. The magnitude of the portion of the industry affected by the Court's interpretation of the Waterman decision dicta depriving it of a right to a hearing and judicial review at any stage of a proceeding may be gathered from a comparison of the net assets invested by various groups of certificated air carriers receiving mail pay:[1]

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[1] Quarterly Report of Air Carrier Operating Factors, June 1955, Civil Aeronautics Board, Office of Carrier Accounts and Statistics, at pg. 21.

Domestic, Foreign and Overseas Combination Carriers	$880,653,000[2]
Foreign or Overseas Carriers only	276,646,000
Domestic Carriers only	100,381,000

Virtually all passenger carriers except the local feeder lines have some overseas and foreign segments to their route systems. Any proceedings involving routes with foreign and overseas points must be sent to the President for approval. Most important actions affecting carriers in some way do involve their route systems. The decision of the Court of Appeals removes any responsibility of the Board or the President to grant the hearing required by the Civil Aeronautics Act and the Administrative Procedure Act. If the Board can deny a fair hearing in the instant case, disregarding some statutory requirements, it can deny a hearing altogether in the next case, disregarding all statutory requirements. A significant part of an essential industry has been removed from the operation of important parts of the Act and is committed to the vagaries of politics, with no Congressional standards enforceable against anyone by the Court of Appeals' interpretation of the dicta of Mr. Justice Jackson in the Waterman Case.

The interpretation of the Waterman decision by the Court of Appeals is inconsistent with its decision in *Colonial Airlines* v. *Adams*, 87 Fed. Supp. 242, 338 U.S. 942, 338 U.S. 947. According to Mr. Justice

[2] An allocation of investment as to domestic route operations on the one hand and foreign and overseas on the other would show more dollars invested in domestic routes. For the most part the two are integrated to a degree that any action which affects the foreign and overseas routes has serious impact upon the domestic and vice versa.

Jackson's dicta in the Waterman Case the Board was a mere advisor to the President with no legal significance attached to the method by which it formulated its advice and the President in turn was free from any Congressional standards. Apparently the Court adopted this reasoning in the instant case. On the other hand in Colonial Airlines v. Adams (supra) ~~the U.S. Court of Appeals~~ for the District of Columbia ~~Circuit~~, Judge Goldsborough dissenting, upheld the constitutionality of sections 801 and 1006 of the Civil Aeronautics Act on the ground that Congress had put into the Act adequate standards. Unreviewable and unenforceable standards which are inapplicable to the Board and the President in the Court's view of Mr. Justice Jackson's dicta in the Waterman Case and yet are adequate to support the constitutionality of the Act in Colonial Airlines v. Adams (supra) against the charge of undue delegation of the legislative authority creates a confusing conflict on a substantial constitutional question.

The Court's interpretation of the Waterman decision deprives petitioner of property without due process of law. Petitioner has spent millions of dollars in flight and ground equipment, advertising and developmental operations in perfecting routes duly granted it between New York and Florida with the expectation that such routes would not be revoked in whole or in part by any action of the Board or the President without due process of law. The power of the Board to revoke or impair the routes in the public interest with due process is not challenged. Neither the Board nor the President has the power to do so without due process.

The Board's order under review prejudges an approval of a transfer of routes from Colonial to Eastern in flagrant disregard of the Act. One of the results of this, injurious to petitioner, will be the provision by Eastern of service from Ottawa, Montreal and other points on Colonial's routes of one plane, through service, to all points on Eastern and petitioner's routes between New York and Florida at which they so bitterly compete. As a practical matter the Board's action preempts for Eastern a vast amount of traffic for which Eastern and petitioner had competed and in so doing depreciates accordingly the value of petitioner's existing routes. No one could say petitioner's routes are worth as much after the merger as before. Petitioner does not seek protection from competition, nor protection from route changes arrived at after fair hearings on the question of public interest. It seeks protection of the millions invested by stockholders from being impaired by allocations and preemption by the Board of the traffic market without a fair hearing required by the statute and the due process clause of the Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CROSS

CLAYTON L. BURWELL
Counsel for Petitioner

APPENDIX

APPENDIX

APPENDIX A—STATUTES

ACT JUNE 23, 1938 C. 601, 52 Stat. 977 ("Civil Aeronautics Act") 49 USC 401 et seq. Sec. 401 (49 USC 481(i)) "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Sec. 408(b) (49 USC 488(b)) "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board and *thereupon*[3] the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: Provided, That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control * * *" (Remainder not material)

Sec. 801 (49 USC 601) "The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any

[3] Italics supplied.

certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 482 of this title, shall be subject to the approval of the President. Copies of all applications in respect to such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before *hearing thereon*, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. * * *" (Remainder not material).

Sec. 1006(a) (49 USC 646(a)) "Any order, affirmative or negative, issued by the Board under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 601 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by lease of court upon a showing of reasonable grounds for failure to file the petition theretofore."

Act June 11, 1946 C. 324, section 2 et seq. 60 Stat. 237 ("Administrative Procedure Act") (5 USC 1001) et seq.

Sec. 7(d) (5 USC 1006(d)) "The transcript of testimony and exhibits together with all papers and requests filed in *the proceeding*, shall constitute the exclusive record for decision in accordance with section 1007 of this title and * * *" (Remainder not material).

APPENDIX B—U. S. CONSTITUTION

Art. 1, Sec. 8 of the U.S. Constitution: "Congress shall have Power * * * to regulate Commerce with foreign Nations."

Art. 1, Sec. 1 of the U.S. Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

Amendment V to the U.S. Constitution: "No person shall be * * * nor be deprived of life, liberty, or property, without due process of law; * * *."

Filed Sept. 15, 1955

APPENDIX C

Order of United States Court of Appeals for District of Columbia Circuit—Dated Sept. 15, 1955

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1955

No. 12,878

NATIONAL AIRLINES, INC., a corporation, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

Before: Edgerton, Chief Judge, Wilbur K. Miller and Fahy, Circuit Judges, in Chambers.

ORDER

This case came on for consideration on the motions to dismiss filed by respondent and intervenor, Colonial Air-

lines, Inc., and by intervenor, Eastern Air Lines, Inc. and said motions were argued by counsel.

Upon consideration whereof, it is ORDERED by the Court that the aforesaid motions to dismiss be granted and that this petition for review be, and it is hereby, dismissed.

Dated: September 15, 1955.

Per Curiam.

APPENDIX D

Order of Civil Aeronautics Board

Appendix B

Order No. E-9347

UNITED STATES OF AMERICA CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 28th day of June, 1955

Docket No. 6998

In the matter of the
EASTERN-COLONIAL ACQUISITION CASE

ORDER DENYING APPEAL AND GRANTING INTERVENTION

This matter comes before the Board on the appeal of National Airlines, Inc. (National), from the following rulings made by Examiner Ralph L. Wiser, at a pre hearing conference in the above-entitled proceeding on May 18, 1955:

On motion of Eastern Air Lines, Inc. (Eastern) to limit the issues, the Examiner ruled that in view of prior findings made by the Board in the *Eastern-Colonial Acquisition Case*, Docket No. 5666 *et al.*, and in the *Eastern-Colonial Control Case*, Docket No. 6582, the issues upon which

evidence will be heard are limited to: (1) whether the terms of the Eastern-Colonial acquisition agreement are not consistent with the public interest; and (2) if the acquisition is to be approved, the terms and conditions, if any, that should be attached and the modifications, if any, that should be prescribed. The Examiner also ruled that, while evidence will not be received regarding Eastern's former acquisition of control of Colonial Airlines, Inc. (Colonial), in violation of section 408 and the subsequent termination of that control, the parties may present arguments to the Examiner and the Board on a contention that Eastern should not be authorized to acquire Colonial at this time because of its prior violation. The ruling further provides that in support of such arguments, the parties may refer to the previous Board and Examiner's findings on the violation and termination thereof.

The Examiner denied National's motion for postponement of procedural dates until the *Eastern-Colonial Control Case,* Docket No. 6582, is finally concluded, pointing out that the Board can defer final action in this case, if justified, when the matter is submitted to the Board for decision. The Examiner also recommended denial of National's petition for consolidation into this proceeding: (1) its application for extension of Route No. 31 to Montreal and (2) the issue of integration of National and Colonial. The Examiner stated that consolidation would substantially expand the issues and delay the proceeding ; ' 'hat the proceedings sought to be consolidated are not so related that their consolidation would be justified.

In its appeal, National contends that the Examiner prejudged Eastern's motion to limit the issues, in that he ruled on Eastern's motion before National's answer thereto had been filed and before the time for filing the answer had expired. National also claims that the Examiner's ruling on the merits of the motion was erroneous for the following reasons: (1) The record in the original *Eastern-Colonial Acquisition Case,* Docket

No. 5666 *et al.*, is more than two years old and the economic data in the record are even older; (2) since the old record, Colonial's position has improved in that: the carrier has shown a profit for two successive years for the first time in its corporate history, its breakeven need has been reduced, it has received additional route authorizations, and has shown increases in revenue passengers, traffic ton miles, fares and load factors; (3) Eastern's dominance has been extended by the Northwest-Eastern interchange, giving Eastern access to Minneapolis/St. Paul and Milwaukee, and its route has been amended to authorize service on an alternate route from Charlotte, N. C., to Detroit, via Columbus and Toledo; (4) Eastern's net worth, available seat miles and domestic load factor have increased, and Eastern dominates the Florida-East Coast market; and (5) the Board's prior finding that Eastern's control of Colonial had been terminated is not *res judicata;* the issue is whether Eastern has control now and that question cannot be answered until all evidence has been adduced in this case.

National also contends that the Examiner erred in denying its motion to postpone procedural dates. The carrier contends that since it had until June 1, 1955, within which to file a petition for reconsideration of the decision in the *Eastern-Colonial Control Case,* Docket No. 6582, the institution of the instant proceeding is premature and a prejudgment of any petition for reconsideration. As to denial of its petition for consolidation National argues that consolidation of its route extension application will provide the Board with an alternate method of providing one-carrier service between Florida and Montreal and the award of such a route to National may be necessary to justify a finding that Eastern's acquisition of Colonial would not result in a monopoly in this market. The carrier urges that consolidation of the issue of integration of National and Colonial is required under the Board's holding in the original *Acquisition Case* that the objectives of

the *National-Colonial Integration Investigation* and the *Eastern-Colonial Acquisition* proceeding were mutually exclusive.

National has requested oral argument of its appeal. Eastern and Colonial have each filed answers to National's appeal. Upon consideration of National's appeal and the answers thereto, the Board finds it unnecessary to pass upon the alleged prejudgment of Eastern's motion to limit the issues. Inasmuch as the Examiner allowed this appeal to be taken to the Board, the Board has full opportunity to correct any error in the Examiner's ruling on the merits of said motion. However, the Board has considered the merits of the Examiner's rulings and finds that they are valid and proper.

We find that no useful purpose would be served by retrial of the question whether an Eastern-Colonial integration would be consistent with the public interest, whether it would create a monopoly and restrain competition or jeopardize another air carrier not a party to the agreement, and whether an Eastern-Colonial integration would result in a greater advantage to the public than would flow from a National-Colonial combination. These issues have been fully determined in the *Eastern-Colonial Acquisition Case*, Docket No. 5666 *et al.*, where National participated as a party and had ample opportunity to explore these issues. The Board also finds that there is no sound reason to retry the issue whether Eastern has control of Colonial at this time, in view of the recent determination of that issue in the *Eastern-Colonial Control Case*, Docket No. 6582, and National's participation in that proceeding. The factual allegations set forth in National's appeal to support National's contention that the facts have changed since the determination of the foregoing issues do not, if true, indicate that the circumstances have changed to such an extent as to require the Board to retry these issues.

With regard to National's motion to postpone procedural dates in the instant proceeding until after the determination of the petition for reconsideration filed by National in the *Eastern-Colonial Control Case,* Docket No. 6582, that matter is now moot, for the petition in question has been denied by Order No. E-9308, adopted June 15, 1955.

The Board agrees with the Examiner's recommendation that National's petition for consolidation should be denied. We find that the consolidation of National's route extension application would unduly expand the issues and delay the instant proceeding, and that a determination of that application is not necessary to a decision as to whether the acquisition agreement should be approved.

National has filed a petition for leave to intervene and the Board finds it appropriate at this time to make its ruling upon said petition. Upon consideration of the petition and the answer of Eastern thereto, the Board finds that National is a proper party in interest whose intervention will be conducive to the ends of justice and will not unduly impede the conduct of these proceedings.

THEREFORE, IT IS ORDERED:

1. That National's appeal be and it is hereby denied, and the Examiner's rulings appealed from are hereby affirmed;

2. That National's motion for consolidation filed May 16, 1955, be and it is hereby denied;

3. That National be and it is hereby granted leave to intervene in this proceeding.

By the Civil Aeronautics Board:

/s/ M. C. MULLIGAN
M. C. Mulligan
Secretary

(SEAL)

[redacted]

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OCTOBER TERM, 1955

No. 561

NATIONAL AIRLINES, INC., a Corporation, *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., COLONIAL AIRLINES, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR COLONIAL AIRLINES IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the District of Columbia Circuit did not render an opinion and its order dismissing Petitioner's petition for review is not reported. The Court's order is printed in Appendix C to the petition. The order of the Board as to which Petitioner sought review in the court below is printed in Appendix D to the petition.

JURISDICTION

Jurisdiction is adequately alleged in the petition.

QUESTION PRESENTED

In the view of Colonial Airlines, an intervenor below, the sole question presented is whether an interlocutory order merely prescribing the procedure to be followed in a Civil Aeronautics Board acquisition proceeding (a proceeding in which one air carrier seeks authority to acquire routes and assets of another carrier which is only completed when the President of the United States has approved or disapproved the action recommended by the Board) is reviewable by a Court of Appeals.

STATUTE INVOLVED

The Statute involved is the Civil Aeronautics Act of 1938, 52 Stat. 973 *et seq.*, 49 U.S.C. 401 *et seq.*, Sections 408(b), 801 and 1006(a), the relevant provisions of which are printed in Appendix A to the petition for certiorari.

STATEMENT OF THE CASE

Since 1951, with the approval and formal encouragement of the Civil Aeronautics Board, Colonial Airlines has been a candidate for merger or acquisition. The regional, shorthaul nature of its operations have necessitated this step; it has been supported by subsidy throughout its history; its stockholders have not received a dividend in the company's twenty-seven year history. The two air carriers with which Colonial could logically be merged have always been Eastern Air Lines and National Airlines. Toward this end a series of negotiations have been conducted over the years and a series of proceedings have been held before the Board.[1] National has not made a bid for Colonial's assets since 1952.

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[1] Previously, the Board had approved an Eastern-Colonial merger. This was not approved by the President because at the

On January 28, 1955, a contract providing for the acquisition of Colonial's routes and assets by Eastern was signed, the contract to terminate on its own terms if the necessary governmental approval could not be obtained within one year. A proceeding seeking this approval was initiated before the Civil Aeronautics Board on February 5, 1955. National intervened.

Because of the prior proceedings in connection with this acquisition, the Board, on June 28, 1955, issued an order limiting the issues in the Colonial-Eastern Acquisition Case. In the order, over National's objection, the Board declined to retry the issues of whether an Eastern-Colonial consolidation would be in the public interest and of whether Eastern controlled Colonial. The Board also refused to consolidate National's application for a route to Montreal or to include the issue of whether a National-Colonial integration would better serve the public interest then an Eastern-Colonial integration. On August 26, 1955, National filed its petition for review and motion for a stay in the United States Court of Appeals for the District of Columbia Circuit. National now seeks to obtain a writ of Certiorari to review the dismissal of its petition for review by the court below.

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time it had been held that Eastern had acquired technical control of Colonial without obtaining prior approval of the Civil Aeronautics Board. A subsequent investigation determined that Eastern no longer held control over Colonial. The President's disapproval did not affect the finding made by the Board that an Eastern-Colonial integration would be in the public interest. These orders are referred to and summarized in the Brief in Opposition filed by the Board.

ARGUMENT

Colonial Airlines takes the position that National's petition for Certiorari is filed for purposes of delay in order to prevent governmental approval of Colonial's contract with Eastern by January 28, 1956, the termination date of the contract. There is no substance to National's claims. It was fully heard before the Civil Aeronautics Board on all relevant subjects and was not in any way denied due process of law. The order which it attacks is, under a decision of this Court, clearly a non-reviewable order. The petition should be promptly denied.

National Has No Case on the Merits

National's petition for Certiorari contains allegations or intimations that its certificate has been revoked in part or that its routes have been impaired without due process of law. No effort is made to explain to the Court the nature of its claim with respect to denial of due process. Its petition for review below discloses that the root of its complaint is its failure to get one more rehearing on issues which had been thoroughly heard in previous cases in which National was an active and aggressive party. The order complained of removed from the Colonial-Eastern Acquisition Case the issues of whether an Eastern-Colonial consolidation would be consistent with the public interest and whether it would create a monopoly. Yet these issues were litigated in a consolidated proceeding known as Docket No. 5666 and 5569 in which National was an active party. National alleges that the findings made in these Dockets were out of date at the time of the order involved in the instant case; but, this contention was met by the Board in the order under attack. The Board pointed out that National had made no allegations of factual change of sufficient signifi-

cance to warrant a reexamination of the earlier decision. (Appendix D to petition.)

National next contended that the Board should have retried the issue of whether Eastern controlled Colonial. A case in which the question of control was the sole issue (CAB Docket No. 6582) and in which National was an active party had been concluded less than a month previously.

Before the Board National sought to have its own application for a route to Montreal consolidated with the Colonial-Eastern Acquisition Case. This broadening of the issues would obviously have unduly delayed the acquisition case. The Board declined to accede to this request; and its action in this regard is supported by the case of *Seaboard and Western* v. *CAB,* 181 F. 2d 777.

Finally, National complained of the Board's refusal to include as an issue in the Colonial-Eastern Acquisition case the issue of whether a merger between National and Colonial would be more in the public interest. No contract of merger between National and Colonial was before the Board and the Board had no power to order one. In a previous proceeding, Docket No. 5666 and 5569, the CAB had ruled on June 17, 1954, Order No. E-8446, that a combination of Eastern and Colonial was preferable and that "it would cause less revenue diversion from National than would be suffered by Eastern if National and Colonial merged."

National's complaint to this Court that it has been denied due process of law is based on the above facts. Clearly, it has had its day in court in this and related proceedings on every issue which the Board is required to consider in connection with the Colonial-Eastern Acquisition. The order now sought to be reviewed

merely limited the issues (and accordingly the evidence) in the present acquisition proceeding because all the matters raised by National had already been presented. Due process, it is submitted, could not be served by a continued retrial of such issues. Every controversy must end at some time. Administrative agencies, like courts cannot, if they are to function at all, permit the injection of old, already decided issues into every new proceeding that is begun. If they did, the whole administrative process could be hopelessly frustrated by disgruntled aspirants for the authority sought in each pending proceeding. (Cf. *Interstate Commerce Commission* v. *Jersey City,* 332 U.S. 503 (1944)).

National Has Shown No Right to a Review

The order which National seeks to have reviewed was an interlocutory order; it merely determined the subsequent procedural course in a proceeding which has not even as yet been completed. No authority has been cited for the proposition that an order such as this one is reviewable in the courts. It is almost axiomatic that interlocutory orders, particularly when relating to procedure, are not.

In this particular case the proceeding will ultimately involve the participation of the President of the United States. There can be no question under applicable decisions that judicial review is not available in a case in which the President has acted. *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Company,* 333 U. S. 103 (1948).

The Waterman case also held that no review may be had of an interlocutory order issued in a proceeding such as this one where the President must ultimately approve the action taken by the Board. Na-

tional makes the contention that this holding is dictum. However, Mr. Justice Jackson's opinion considered the reviewability of interim orders in the course of reaching conclusions with respect to reviewability of a final order involving presidential approval. Furthermore, and of significance here, the dissenting opinion of Mr. Justice Douglas indicated that the whole Court agreed that an interlocutory order cannot be reviewed prior to the time the President has acted. Accordingly, the authority of the entire court stands squarely behind the proposition that National has no right to a review of this purely procedural, interlocutory order at this time.

National contends that if no review is available the statute is unconstitutional. This contention is premature in this case and is a self-defeating argument at best. National's only right to go to the Court of Appeals is created by the very statute which National would now strike down on constitutional grounds. (Sec. 1006(a) of the Civil Aeronautics Act, 49 USC 646(a))

National has no right to have this order reviewed.

CONCLUSION

The contract between Eastern and ~~National~~ Colonial expires on January 28, 1956. The parties to the contract, of course, can extend it and may do so. The Board, however, has no power to order it extended and if approval is not forthcoming by that date, the rights which Colonial stockholders presently have under the agreement are at an end. Proceedings in the acquisition case, looking toward the obtaining of the decision by the President, may well be in abeyance pending disposition of National's petition for a writ of certiorari in this Court. National on December 19

specifically requested the Board in writing that this be done.

Accordingly, Colonial respectfully requests this Court to dispose of National's petition at the earliest possible time. We submit that the order of the court below is fully supported by the decision of this Court and that the petition for a writ of certiorari should be denied. We request that it be denied promptly so that Board and Presidential approval, if forthcoming, will apply to a contract which is still in effect.

Respectfully submitted,

STEPHEN AILES
1100 Shoreham Building
Washington, D. C.
Attorney for
Colonial Airlines

Of Counsel
STEPTOE & JOHNSON
1100 Shoreham Building
Washington 5, D. C.

SULLIVAN, DONOVAN, HANRAHAN,
McGOVERN AND LANE
14 Wall Street
New York, New York

EDMOND M. HANRAHAN
14 Wall Street
New York, New York

EDWARD A. SILLIERE
14 Wall Street
New York, New York

L. ORVILLE CAMERON
230 Park Avenue
New York, New York

DEC 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1955

No. 561

NATIONAL AIRLINES, INC., a Corporation,

Petitioner,

—v.—

CIVIL AERONAUTICS BOARD,

Respondent,

—and—

EASTERN AIR LINES, INC.,
COLONIAL AIRLINES, INC.,

Interveners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR EASTERN AIR LINES, INC. IN OPPOSITION

E. SMYTHE GAMBRELL
W. GLEN HARLAN
TERRY P. McKENNA
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

Counsel for Eastern Air Lines, Inc.

GAMBRELL, HARLAN, RUSSELL, MOYE & RICHARDSON
825 Citizens & Southern
National Bank Building
Atlanta 3, Georgia

Of Counsel

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Interveners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR EASTERN AIR LINES, INC. IN OPPOSITION

Opinions Below

The Court of Appeals did not render an opinion, and its order of dismissal (Petition for Certiorari, Appendix C) is not reported. The opinions and orders of the Civil Aeronautics Board are not reported but are included in the materials certified as part of the record herein.

Jurisdiction

The basis of jurisdiction is adequately set forth in the petition.

Questions Presented

1. Whether the Board's interlocutory procedural order determining the scope of the evidence and issues in the administrative proceeding of which review was sought below has sufficient finality to be ripe for review;

2. Whether the provisions of the Act permit review of interlocutory procedural orders in proceedings where ultimate determination must be made by the President; and

3. Whether the Board's order for which review was sought below deprived National of a fair hearing or any other procedural right.

Statement

On July 24, 1952 Eastern and Colonial filed with the Civil Aeronautics Board as required by Sections 408 and 412 of the Civil Aeronautics Act, a joint application for approval of an agreement under the terms of which Eastern would acquire all of the air transportation system and other assets of Colonial. Extensive public hearings, in which petitioner actively participated, were held in Docket 5666, the *Eastern-Colonial Integration Agreement Case.*[1] On charges by petitioner of "illegal control" of Colonial by Eastern, following disapproval of the agreement by the President, the

[1] Petitioner's allegation (Pet., p. 3) that "Thereafter Eastern defeated a National-Colonial integration by gaining illegal control of Colonial" is wholly unfounded as the Board has determined. As a matter of fact, in the public hearings petitioner made precisely this charge and sought to adduce evidence to that end. The Trial Examiner found that petitioner's charges were unfounded and petitioner took no exception to that finding although it filed voluminous exceptions to other facts found by the Examiner.

Board instituted a proceeding known as *In The Matter Of The Investigation of Control of Colonial Airlines, Inc., by Eastern Air Lines, Inc.*, under Docket 6582. Following extensive public hearings, this investigation was concluded with a finding by the Board's Counsel, the Examiner and the Board that Eastern did not control Colonial.

On February 3, 1955, Colonial Airlines, Inc. ("Colonial") and Eastern Air Lines, Inc. ("Eastern") filed with the Civil Aeronautics Board ("the Board") a joint application seeking approval of an agreement dated January 28, 1955 under the terms of which Eastern would acquire all of the air transportation system and other assets of Colonial. Evidentiary hearings were concluded in the proceeding on August 1, 1955, an Examiner's recommendations were published on October 26, 1955, exceptions and briefs in support thereof were filed, oral argument before the Board was held on November 28, 1955, and the case stands submitted to the Board for decision. Since the Colonial routes involve foreign operations, the ultimate decision of the President approving or disapproving the agreement is required pursuant to Section 801 of the Civil Aeronautics Act ("the Act"). In its orders defining the procedures to be followed in the evidentiary hearings (Pet., App. D, p. 5a), of which orders review was sought below, the Board decided that, since voluminous evidence on certain aspects of the agreement had already been received in companion cases in which National participated most actively, it would in the current case not hear further evidence with respect to any questions except (a) whether the terms of the agreement are not consistent with the public interest, and (b) what, if any, terms and conditions should be attached, and what modifications, if any, should be prescribed in the event of approval.

Statutes Involved

The statute involved is the Civil Aeronautics Act of 1938, as amended, 52 Stat. 973, 49 U. S. C. 401 *et seq.*, Sections 401(i), 408(b), 801 and 1006(a), the relevant provisions of which are printed in the appendix hereto.

Argument

1. The Board's order, for which review is sought here and was sought below, is obviously an interlocutory procedural order for which review is not provided. This Court in *Chicago & Southern Air Lines, Inc.* v. *Waterman Corp.*, 333 U. S. 103 (1948), stated the established rule that "administrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process." *United States* v. *Los Angeles & Salt Lake R.R.*, 273 U. S. 299 (1927); *United States* v. *Illinois Central R.R.*, 244 U. S. 82 (1917); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125 (1939). The order here complained of by petitioner is not within any of those categories.

Petitioner apparently recognizes that preliminary interlocutory orders are not subject to review, but it contends that review should be accorded *this* interlocutory order because the *Waterman* decision held that a *final* order (approved by the President) is not subject to judicial review. It is difficult to understand why an interlocutory order should be thought to be reviewable *solely because* it would be unreviewable if it were final. On the contrary, it seems clear that in the interlocutory stage the order would be doubly unreviewable: First, because it is not final and therefore determines no rights or obligations, and second, because finalization by the President will add mat-

ters of executive discretion which the Court could not review in any event and therefore any attempt at judicial action would be a nullity.

Whatever argument petitioner may have as to the correctness of the *Waterman* decision in holding review unavailable *after* Presidential action, there can be no valid argument as to the unavailability of review at this preliminary stage. In the *Waterman* case, the Court divided five to four on reviewability *after* decision by the President, but the Court was *unanimous* in holding that judicial review is not available at the interlocutory stage here involved.

The majority of this Court pointed out that an order of the Board prior to Presidential action "can give nothing and can take nothing away" (333 U. S. 112) and held that *until* Presidential approval the order was not a final determination and *after* Presidential approval it was unreviewable because the courts cannot review the exercise of Presidential discretion.

The dissenting opinion, while dividing with the majority upon the question of review *after* Presidential action, agreed that review is unavailable *before* such action, stating (333 U. S. 116) that "Approval by the President under this statutory scheme has relevance for the purposes of review only as indicating *when* the action of the Board is reviewable . . . When the order fixes rights, on clearance by the President, it becomes reviewable."

Thus the *Waterman* decision, contrary to petitioner's contention, is *undivided* on the proposition that orders of the interlocutory nature of that now before the Court are not susceptible of review. The present case has not yet reached the stage of Presidential action and is therefore, pursuant to this Court's *unanimous* opinion in *Waterman*, not subject to review and petitioner's request is premature.

Petitioner's request is founded on the two assumptions (1) that the Board will approve the agreement and (2) that the President will approve the Board's decision. Both assumptions are merely "presently hypothetical results" as to which this Court, and the parties, at this juncture, can do no "more than speculate" (*United Air Lines, Inc.* v. *Civil Aeronautics Board,* No. 12,043, CADC, 5 Pike & Fischer, Ad. Law (2d) 254, 257, decided June 20, 1955).

2. Nor does petitioner's inability to obtain review of an interlocutory order at this time raise any question of the constitutional validity of Section 801 of the Act as a delegation of authority to the President without standards.

In the first place the question of the existence of standards is separate and distinct from the requirement of review to insure the application of those standards. Petitioner calls upon this Court to assume that the Board and the President will not abide by the required standards. The Court can make no such assumption, and petitioner has not contended that the Act's substantive standards have been or will be ignored. It suggests merely that they might be, and that therefore judicial review is necessary under the Constitution. But the courts cannot act to correct "wrongs" which have not occurred and are merely speculative.

The constitutional validity of Section 801 in cases where judicial review is not available even after final decision was implicitly established by this Court in the *Waterman* case (333 U. S. 109). As a three-judge district court has concluded:

> "While the immediate question involved in the *Waterman* case was that of the construction of the statute as it relates to judicial review of a domestic carrier seeking a permit to engage in foreign operation, it

> seems necessarily implicit in what the Court said that the Congress had the right to make the delegation which it did make in this statute." *Colonial Airlines, Inc.* v. *Adams,* 87 F. Supp. 242, 243 (D. D. C. 1950), appeal dismissed on motion of appellant, 338 U. S. 947 (1950).

It is difficult to believe that this Court would have held review unavailable in the *Waterman* case without even noting the constitutional difficulty—if one had been present —created by such unavailability.

Moreover, in the *Waterman* decision this Court cited *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304 (1936), and other authorities holding that Congressional standards for Presidential action in the field of foreign commerce need not be as rigid as in other fields. There can be no doubt therefore that determination of the constitutional validity of Section 801 was before this Court and considered by it in the *Waterman* case and that the Court's decision in that case implicitly, if not directly, confirmed the constitutional validity of Section 801.

Nor can petitioner evade the force of the implicit conclusions of the *Waterman* decision by the simple expedient of discarding the language of Mr. Justice Jackson as "dicta." It is too well established to require lengthy argument that all conclusions which are necessary to an integral parts of a judicial decision are part and parcel of the *ratio decidendi* and not mere "dicta." *Railroad Companies* v. *Schutte,* 103 U. S. 118 (1881); *Jones* v. *Habersham,* 107 U. S. 179 (1883); *Union Pacific R.R.* v. *Mason City and Ft. Dodge R.R.,* 199 U. S. 160 (1905).

Petitioner regards as "dicta" (Petition, pp. 6-7) the statement of the Court in the *Waterman* case that the Board was "a mere advisor to the President" and that therefore review of the Board's actions could not be had at any time

—not even, as the Court of Appeals thought in that case (166 F. 2d 1021), after the decision had become final upon approval by the President. Such statements by Mr. Justice Jackson obviously did not constitute dicta. They were the gist of the decision. As the Court then stated (333 U. S. 113):

> "The dilemma faced by those who demand judicial review of the Board's order is that, before Presidential approval, it is not a final determination even of the Board's ultimate action, and after Presidential approval, the whole order, both in what is approved without change, as well as in amendments which he directs, derives its vitality from the exercise of unreviewable Presidential discretion."

Certainly such statements are not "dicta." As the Court stated in *Eisner* v. *Macomber,* 252 U. S. 189, 205 (1920), a statement "cannot be regarded as obiter dictum" where it has "furnished the entire basis for the conclusion reached."

3. Petitioner has not shown, and indeed could not show, that it has been deprived of a fair and complete hearing before the Board or has been deprived of any procedural right to which it is entitled either by the Constitution or by statute.

The question of the fairness of the administrative hearing afforded petitioner was extensively briefed and argued before the court below and was, in fact, one of the grounds upon which respondent's motion to dismiss was based. Petitioner's conclusion that the Court of Appeals granted the motion to dismiss solely on the authority of the *Waterman* decision is therefore unfounded. The Court of Appeals has had occasion in the past to hold that its jurisdiction to review an interlocutory order can be invoked and exer-

cised only upon a showing of deprivation of right by the order. *Seaboard & Western Airlines, Inc.* v. *Civil Aeronautics Board,* 86 App. D. C. 9, 181 F. 2d 777, 779 (1949). The dismissal below could have been, and it can reasonably be assumed was, granted on the merits and can be sustained on that basis.

The *Eastern-Colonial Integration Agreement Case* has been a very lengthy proceeding involving three separate hearings. In July 1952, the first *Eastern-Colonial Integration Agreement Case* was presented to the Board for hearings which were held in the Fall and Winter of 1952–1953. On charges by petitioner of "illegal control," a proceeding (*In the Matter of The Investigation of Control of Colonial Airlines, Inc. by Eastern Air Lines, Inc.*) was instituted. Extensive public hearings were held in both cases. When the present *Eastern-Colonial Integration Agreement Case* was set for hearing, the Board properly decided that no necessity existed for relitigation of all the phases of the agreement upon which evidence had been received in the previous cases in the absence of a showing of substantially changed conditions.

In all of these proceedings petitioner was given the opportunity over a period of many weeks of hearings, and in numerous briefs, and other documents, and in oral argument before the Board, and in petitions for rehearing and reconsideration and for reopening of the record, to show that the integration of Eastern and Colonial would not be consistent with the public interest.

Moreover, in the phase of the case which is now before the Court, petitioner was afforded numerous opportunities to file documents with the Board to present such new and additional facts as might be available to it and might be helpful in persuading the Board to hear further evidence on those phases of the agreement heard in the companion

cases. Petitioner actually did file a lengthy appeal document with the Board in which it set out numerous factors which it claimed called for further investigation and a different result from the prior decisions.[1] Upon consideration of the facts alleged by petitioner, the Board found that the "factual allegations set forth in National's appeal" did not "indicate that the circumstances have changed to such an extent as to require the Board to retry these issues" (Order E-9347, Petition, App. D., p. 7a).

The right of the Board to support its findings by reference to companion cases is firmly established. *Crichton, et al.* v. *United States, et al.*, 56 F. Supp. 876, 880 (S. D. N. Y. 1944); *National Fire Ins. Co. of Hartford* v. *Thompson*, 281 U. S. 331 (1930); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515 (1946). In the case last cited this Court said:

> "In the absence of any showing of specific prejudice, that claim comes down to the highly technical objection that the Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings. The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing.
>
> "Obviously, it would be consistent with neither good sense, nor, we think with the type of hearing assured by the statute to force the Commission to put on such complete blinders."

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[1] Petitioner alleged all of these "facts" again in the documents it filed with the Court of Appeals and based its argument to that Court upon the existence of those facts which, it alleged, necessitated complete new hearings and relitigation of the issues tried and heard by the Board in the companion cases.

It is believed that this Court will not be impressed by petitioner's contention that the Board's limitation of issues to be heard was illegal. What the Board has done is not substantially different from what a trial court commonly does in either (1) declining to grant rehearing in the absence of a showing of substantial new evidence, or (2) applying the principles of *res judicata* or estoppel by judgment to a party who has lost the litigation and has either failed to appeal or has been unsuccessful on appeal. Administrative procedure must be less restrictive than judicial procedure. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 437 (1940).

Petitioner has had a full measure of "due process" before the Board, and the court below properly dismissed its petition for review as wholly without merit.

CONCLUSION

The decision below is proper and correct; petitioner has been deprived of no procedural right; and there is no issue presented by petitioner warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

s/ E. Smythe Gambrell
E. Smythe Gambrell

s/ W. Glen Harlan
W. Glen Harlan

Counsel for Eastern Air Lines, Inc.

APPENDIX—STATUTES

ACT JUNE 23, 1938, C. 601, 52 Stat. 977 ("Civil Aeronautics Act") 49 USC 401 et seq.

Sec. 401(i) (49 USC 481(i)) "No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Sec. 408(b) (49 USC 488(b)) "Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control * * *" (Remainder not material)

Sec. 801 (49 USC 601) "The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402 of this title, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Civil Aeronautics Board before hearing thereon, and all decisions thereon by the Civil Aeronautics Board shall be submitted to the President before publication thereof. * * *" (Remainder not material).

Sec. 1006(a) (49 USC 646(a)) "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 561

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINIONS BELOW

The Court of Appeals did not write an opinion. The opinions and orders of the Civil Aeronautics Board (S. R. 80–165)[1] are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1955 (Pet. App. 3a–4a). The petition for a writ of certiorari was filed on

[1] The symbol "S. R." refers to the Supplement to the Record filed by respondent pursuant to Rule 26 (1) of the Revised Rules of this Court.

December 9, 1955. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The Civil Aeronautics Board has pending before it an application for approval of Eastern Air Lines' proposed acquisition of the routes and properties of Colonial Airlines. Since the Colonial routes involve foreign operations, ultimate approval or disapproval of the acquisition will be made by the President pursuant to Section 801 of the Civil Aeronautics Act. In the course of its proceeding, the Board has entered an order (1) denying consolidation of petitioner's application for certain new routes with the Colonial-Eastern acquisition proceeding, and (2) refusing to reconsider, in the latter proceeding, certain issues already decided in prior related administrative proceedings in which petitioner has participated. Petitioner sought judicial review of that order, and the Board moved to dismiss on several grounds. The court below entered a *per curiam* order of dismissal which did not specify the grounds thereof.

The question presented is whether the petition for review of the Board's order was properly dismissed, either on jurisdictional grounds or as plainly lacking in merit.

STATUTE INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U. S. C. 401

et seq., are set forth in the Appendix, *infra*, pp. 14-16.

STATEMENT

Petitioner National Airlines ("National") and Eastern Air Lines ("Eastern") conduct competing air carrier operations between Florida points and Washington and New York. Colonial Airlines ("Colonial") is a short-haul subsidized carrier which operates (1) between Montreal and Ottawa on the one hand, and New York and Washington on the other, (2) between New York and Bermuda, and (3) between Washington and Bermuda. Its operations hold little hope of becoming economically self-sufficient in the near future.

In 1952 the Board instituted an investigation to determine whether integration of National and Colonial would be in the public interest.[2] Shortly thereafter, however, an application was submitted to the Board for approval of an agreement for the acquisition of Colonial by Eastern, and this application was consolidated for hearing with the pending National-Colonial investigation. *Eastern-Colonial Acquisition Case,* Docket Nos. 5666 and 5569.

[2] Under the Civil Aeronautics Act, the Board has no power to compel consolidation of air carriers, but it frequently indicates situations where it is of the view that voluntary consolidation would be in the public interest. Consolidation agreements require Board approval under Section 408 of the Act.

In the ensuing administrative proceedings, National (which was a party) contended that Eastern had unlawfully acquired control of Colonial prior to the acquisition agreement, and that the agreement was the result of this illegal control. The Board held that Eastern had acquired unlawful control, but that such control had not influenced the execution of the acquisition agreement. It found that the Eastern-Colonial merger was in the public interest, and it therefore did not reach the question whether a National-Colonial merger might also be in the public interest.

Since Colonial's certificates in part cover foreign air transportation, Section 801 of the Act requires Presidential approval for their transfer (*infra*, p. 15).[3] The Board submitted the agreement to the President for approval, but the President disapproved it solely "because of Eastern's unlawful acquisition of control of Colonial in violation of Section 408" (Order E–8136, S. R. 88). In so doing, the President did not disturb the Board's finding that combination of the two carriers would be in the public interest. The Board then entered an order disapproving the merger.

Shortly thereafter, the Board issued an opinion in which it stated that, although it previously had

[3] See *Trans-World Airlines* v. *Civil Aeronautics Board*, 184 F. 2d 66, 71 (C. A. 2), certiorari denied *sub nom. Sparks* v. *Civil Aeronautics Board*, 340 U. S. 941.

concluded that an Eastern-Colonial merger would be more in the public interest than a National-Colonial merger, it had considered the merits of the latter in view of the President's disapproval of the former. It concluded that a merger of National and Colonial would also be in the public interest. The Board stated that it made this determination in order to "open the door to negotiation" between the carriers, and it further stated that if an agreement for the acquisition of Colonial by National would be presented to it for approval, it "would then have before it only the problem whether the terms of the agreement were consistent with the public interest" (p. 4, Order E–8446, June 17, 1954, S. R. 94). The Board pointed out (*id.,* p. 5), however, that in approving a National-Colonial merger it was not deciding that "a future acquisition agreement between Eastern and Colonial would necessarily be inconsistent with the public interest if Eastern, prior to entering into such an acquisition agreement were shown to have clearly divested itself of control of Colonial."

The Board also instituted a separate proceeding, in which National was a party, to compel Eastern to divest control of Colonial. *Eastern-Colonial Control Case,* Docket No. 6582. On April 29, 1955, the Board found that Eastern no longer exercised control over Colonial as of August 31, 1954, and dismissed the proceedings. Order E–9162, April 29, 1955, S. R. 161.

On September 24, 1954 (when Eastern no longer controlled Colonial), Colonial solicited bids from both Eastern and National. National did not bid, and a new Eastern proposal to acquire Colonial was accepted by the latter on January 28, 1955. This proposal was presented to the Board for approval, and National intervened in opposition.

On June 28, 1955, the Board entered the order under review, which had the following consequences:

> (1) The Board limited the evidence to be received in the proceeding to evidence relating (a) to whether the terms of the Eastern-Colonial agreement are consistent with the public interest, and (b) to the terms and conditions which should be attached to the acquisition if approved. This was rested upon findings that no useful purpose would be served by a retrial of the broader public interest issues previously determined in the earlier *Eastern-Colonial Acquisition Case* or by a retrial of the issues relating to Eastern's control of Colonial recently determined in the *Eastern-Colonial Control Case.*
>
> (2) The Board declined to consider whether a National-Colonial integration would be preferable to an Eastern-Colonial merger. This was based upon findings that this issue had been thoroughly explored and determined in the earlier *Eastern-Colonial Acquisition Case* recently concluded by the Board.
>
> (3) The Board denied consolidation into the proceeding of a new route application

filed by National requesting an extension of its routes to Montreal. It found, in this connection, that consolidation would unduly expand the issues and delay the proceeding, and that a determination of National's application is not necessary to decision as to whether the Eastern-Colonial acquisition should be approved.[4]

On August 26, 1955, National filed a petition to review the above order. The Board moved to dismiss[5] on three grounds: (1) That the order related to matters committed to the determination of the President and therefore was not reviewable; (2) that the order was an interlocutory procedural one; and (3) that there was no showing of error by the Board or that National had been deprived of any rights.

On September 15, 1955, the Court of Appeals, after argument, entered a *per curiam* order of dismissal, which does not state the grounds therefor (Pet. App. 3a).

[4] In holding that Eastern's control of Colonial had been terminated (*supra*, p. 5), the Board also found that "no element of control" had entered into the negotiation of the present acquisition agreement. Initial decision in Docket No. 6582, pp. 42–45, S. R. 147–150. In its order of June 28, 1955, the Board stated that National was free to argue in the Eastern-Colonial merger proceeding that Eastern's prior acquisition of control disqualified it from now acquiring Colonial—a contention which National has made before the Board.

[5] Eastern and Colonial intervened, and they also moved to dismiss.

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In the interval, the administrative hearings on the acquisition were completed. On October 26, 1955, the examiner issued a report recommending approval, and on November 28, 1955, the Board heard oral argument. At the time of the filing of this brief, the matter is still pending before the Board and no recommendation has been sent to the President. The acquisition agreement, unless sooner approved or disapproved, will expire by its terms on January 28, 1956.

ARGUMENT

Contrary to petitioner's contention (Pet. 4, 5), it cannot be "presumed" that the court's order of dismissal rested on the fact that the Board's order related to foreign air transportation—a subject which, under *Chicago and Southern Air Lines* v. *Waterman Steamship Co.*, 333 U. S. 103, is generally within the non-reviewable discretion of the President. As we have noted (*supra*, p. 7), the Board moved to dismiss not only because the proceedings related to foreign air transportation, but also because (1) the order was interlocutory and (2) petitioner had not shown that it was erroneous, or that it deprived petitioner of any rights.[6] As we point out below,

[6] In determining whether an interlocutory administrative order is reviewable, the court below has considered, on other occasions, whether it deprives the petitioner of any rights. Cf. *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777, 779 (C. A. D. C.).

entirely apart from the applicability of the *Waterman* decision to the case at bar, the decision of the Court of Appeals is clearly correct.

The Board's order (1) denied consolidation of petitioner's pending new route application with the Eastern-Colonial merger proceeding, and (2) refused to reconsider, in the merger proceeding, certain issues which had been decided in the prior related administrative proceedings—proceedings in which petitioner had fully participated.

In so far as the order denied consolidation, such orders repeatedly have been held non-final for review purposes[7] and, as this Court pointed out in the *Waterman* case, *supra,* pp. 112–113, only final Board orders are reviewable. In any event, the Board correctly denied consolidation. Petitioner sought consolidation on the ground that the two applications were "mutually exclusive," and that the Board therefore could not grant one without a contemporaneous hearing on both. But an application for a new route is not mutually exclusive with an application for transfer of an existing route, and consolidation of the two was not required. *Seaboard & Western Air-*

[7] *E. g., Eastern Air Lines* v. *Civil Aeronautics Board*, 178 F. 2d 726, 727 (C. A. D. C.); *Western Air Lines* v. *Civil Aeronautics Board*, 184 F. 2d 545 (C. A. 9); cf. *Pauley* v. *Federal Communications Commission*, 181 F. 2d 292 (C. A. D. C.).

lines v. *Civil Aeronautics Board,* 181 F. 2d 777, 779 (C. A. D. C.); *Western Airlines* v. *Civil Aeronautics Board,* 184 F. 2d 545, 550 (C. A. 9).

Nor was there any merit to petitioner's contention below that the Board had erred in limiting the issues in the merger proceeding. The right of an agency to refuse to reopen matters decided in a prior stage of the proceedings is well settled,[8] and the Board did not abuse its discretion in applying that principle to the facts of this case.[9]

In sum, the result reached in this case finds full support in familiar and accepted principles of administrative law. The case does not require appraisal of the reach and applicability of the so-

[8] *Georgia Comm.* v. *United States,* 283 U. S. 765; *Pittsburgh Glass Co.* v. *Board,* 313 U. S. 146; *I. C. C.* v. *Jersey City,* 322 U. S. 503, 517; *Crichton* v. *United States,* 56 F. Supp. 876 (S. D. N. Y., 1944), affirmed *per curiam,* 323 U. S. 684.

[9] In the earlier proceedings (the first *Eastern-Colonial Acquisition* case, and the *Eastern-Colonial Control* case, *supra,* pp. 3, 5, in both of which petitioner participated as a party), the Board fully considered and decided against petitioner all the issues under Section 408 which petitioner sought to reopen in the present proceeding—whether the proposed acquisition would result in creating a monopoly or restraining competition; whether the acquisition would promote the public interest; whether an Eastern-Colonial merger would be preferable to a National-Colonial one; and whether Eastern illegally controlled Colonial. As the Board found (Order E–9347, S. R. 82), petitioner did not show any change of circumstances sufficient to warrant reexamination of those issues.

called *Waterman* doctrine. We believe, therefore, that it is not an appropriate vehicle for consideration by this Court of the statutory questions[10] which might be presented if the Court of Appeals had necessarily decided the case on the single ground on which petitioner "presumes" it did.[11]

We, of course, recognize that this Court's decision in *Waterman* involved an attempt to review a substantive determination made with express approval of the President pursuant to Section 801, and that the Court has not passed upon the applicability of the doctrine of non-review, enunciated in that case, to situations involving alleged procedural irregularity by the Board. By the

[10] Contrary to petitioner's suggestion, there is no constitutional right to appellate review of procedural orders of the Board entered in cases involving foreign air transportation. See, *e. g.*, *Reetz* v. *Michigan*, 188 U. S. 505; *Federal Communications Commission* v. *RCA Radio Communications, Inc.*, 346 U. S. 86, 90. The constitutionality of Section 801, in so far as it precludes judicial review of substantive Board orders, was implicitly sustained in the *Waterman* case; see, also, *Colonial Airlines, Inc.* v. *Adams*, 87 F. Supp. 242 (D. D. C.), appeal dismissed on motion of appellant, 338 U. S. 947.

[11] Petitioner did not seek clarification of the basis of the decision below, although almost three months elapsed between entry of the judgment and filing of the petition. Cf. *Chicago & Southern Airlines* v. *Civil Aeronautics Board*, C. A. D. C., No. 10, 375, certiorari denied, 340 U. S. 829, where review was sought of a Board order, issued after Presidential approval, which certificated a carrier to conduct international operations. The Board moved to dismiss on several grounds, among them, that under *Waterman* its order

same token, the Court has not considered whether, assuming that in the latter situation there may be review at some point, such review may be obtained at an interlocutory stage, *i. e.*, before consideration by the President and entry of a final order. Granting that these questions are novel and that they might, in some contexts, assume importance, we submit that there is neither need nor occasion to explore them in a case in which the underlying claim of procedural irregularity is, itself, patently insubstantial.

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was not reviewable. The Court of Appeals entered a *per curiam* order of dismissal which, as in the case at bar, did not specify the grounds for its action. The carrier moved for reconsideration or clarification, and the court then entered a clarifying order dismissing the petition for review on the authority of the *Waterman* case. See Record on Appeal, October Term, 1950, No. 235, pp. 61–63, 65–66, 71–72.

CONCLUSION

The decision below is clearly correct and there is no conflict of decision. The petition for a writ of certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
STANLEY N. BARNES,
Assistant Attorney General.
DANIEL M. FRIEDMAN,
Attorney.

FRANKLIN M. STONE,
General Counsel,
JOHN H. WANNER,
Associate General Counsel,
O. D. OZMENT,
Chief, Litigation and Research Division,
GERALD F. KRASSA,
Attorney,
Civil Aeronautics Board,
Washington 25, D. C.

JANUARY 1956.

APPENDIX

STATUTORY PROVISIONS

The relevant provisions of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 977, as amended by Reorganization Plans 1940, Nos. III and IV, 54 Stat. 1233 and 1235, and Act of May 24, 1949, 63 Stat. 107; 49 U. S. C. 401 *et seq.*, are:

> SEC. 408 (b), 49 U. S. C. 488 (b): Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or aquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger,

purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

SEC. 801, 49 U. S. C. 601: The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of

any certificate issuable under section 401 (e) or any permit issuable under section 402 (c) or to the original terms, conditions, or limitations of any such certificate or permit.

SEC. 1006 (a), 49 U. S. C. 646 (a): Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

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IN THE

Supreme Court of the United States

October Term, 1955

No. 561

NATIONAL AIRLINES, INC., *Petitioner,*

v.

CIVIL AERONAUTICS BOARD, *Respondent,*

and

EASTERN AIR LINES, INC.,

COLONIAL AIRLINES, INC.,
Intervenors.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

JOHN W. CROSS,
CLAYTON L. BURWELL
920 Southern Building,
Washington, D. C.
Counsel for Petitioner

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REPLY BRIEF

To the Honorable, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Petitioner is filing this reply brief in answer to Respondents brief received January 4th, 1956, and to the briefs of Colonial Airlines and Eastern Air Lines, Inc., Intervenors.

The Question Is Novel

Respondent's brief at page 11 states:

> "We, of course, recognize that this Court's decision in Waterman involved an attempted to review a substantive determination made with express approval of the President pursuant to Section 801, and that the Court has not passed upon the applicability of the doctrine of non-review, enunciated in that case, to situations involving *alleged procedural irregularity by the Board.* By the same token the Court has not considered whether, assuming that in the latter situation there may be review at some point, such review may be obtained at an interlocutory state, i.e., before consideration by the President and entry of a final order. *Granting that these questions are novel and that they might in some contexts, assume importance,* we submit that there is neither need nor occasion to explore them in a case in which the underlying claim of procedural irregularity is, itself, patently insubstantial". (Italics supplied)

The Question Is Important to the Industry

Not only is the principal question novel but it is one of vital importance to the greater part of the United States aviation transportation industry. It is significant that neither the Respondent nor the Intervenors challenged the statements in the Petition at pages 5 and 6 on this point.

The Question Is a Substantial One

After conceding the novelty of the question and failing to deny its important impact on the aviation transportation system, Respondent suggests that the procedural irregularity of depriving Petitioner of a hearing on the issues required by Sec. 408(b) of the Act is

insubstantial and that on this account the Court should not grant the Petition, Res. Brief p. 12.

The Petition for Judicial Review before the Circuit Court at page 15 alleged that Petitioner will lose considerable traffic by the merger, that Petitioner has a substantial interest in the order complained of and at page 13 that approval of the merger would result in the development of a monopoly by Eastern Air Lines. Petitioner's allegations of fact were of course assumed to be true by the Circuit Court in granting the motion to dismiss and consequently it would seem difficult to support the theory that the procedural irregularity had an insubstantial impact on the Petitioner as a matter of fact, or that the Circuit Court considered this aspect of the matter when there was no Court review on the merits.

Insofar as the Respondent claims that the procedural irregularity of depriving Petitioner of a hearing on the statutory issues is an insubstantial legal error is concerned, the cases cited by Respondent are inapplicable. Unlike the case here, none of those cases involved the interpretation of a statute requiring a hearing on each specific application for merger as to certain issues. Respondent overlooks the wording of Sec. 408(b) of the Act which states in part:

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board and *thereupon* the Board shall . . ." give a hearing and consider certain issues including the public interest, monopoly, etc. (Italics supplied)

Similarly in Section 801 of the Act (Appendix) the word "thereon" is used twice referring to the specific

application in question and providing a hearing on that application exclusively. In violation of these sections the Board has imported into the instant proceeding certain findings and rejected others made in respect to a distinctly different agreement and application for approval in substitution for the statutory requirements of a hearing on the specific agreement and application presently under consideration.

Apart from the distinction based upon sections 408(b) and 801 of the Act, the cases cited by respondent are of doubtful application. Respondent's brief cites them at page 10 in support of "the right of an agency to refuse to reopen matters decided in a prior stage of the proceedings . . .". It would appear that in *Georgia Public Service Comm.* v. *U. S.*, 283 U. S. 765 and *I. C. C.* v. *Jersey City*, 322 U. S. 503 the agency had re-opened the proceeding, whereas there has been no re-opening of Docket No. 5666 from which the selected findings in question were imported into Docket No. 6998. The principal question however is whether the findings are taken from a prior stage of the same proceeding or from a different proceeding. While the cases cited by Respondent pertain to matters decided in a prior stage of the proceedings. Respondent's brief page 9 characterizes Dockets No. 5666, and 6582, as "prior related administrative proceedings."

The President and the Board closed Docket No. 5666 by order disapproving the earlier proposal for merger. It was not re-opened or consolidated with Docket 6998 nor was any evidence introduced from it into Docket 6998 nor any evidence from it incorporatel by reference into Docket 6998. No judicial notice was taken and *res adjudicata* could appply only to bar further consideration of a merger between Eastern

and Colonial. Since the evidence on which the imported findings are based is not present in the record in this case and not specified it would be difficult for a Court to review a case handled in this way for insufficiency of evidence, for arbitrariness etc. A mere consolidation of the records would of course not suffice as the Board found it necessary to reject some of the findings and evidence in Docket 5666 which did not suit its present purpose. It is not believed that at this stage either the litigants, the Board or the Courts could determine what evidence if any supports the findings in the proceeding in question.

Petitioner submits that the procedural irregularity of depriving it of a hearing on the statutory issues has foreclosed its interests and represents a substantial legal error.

If the Order Is Not Reviewed Now It May Be Unreviewable

Respondent claims the order complained of is interlocutory and not reviewable. Sec. 1006 of the Act under which the petition for review was brought gives the Court jurisdiction to review "any order". The order severed from the hearing the broad statutory issues and was final as to these. There was left an emasculated hearing on narrow issues with a result favorable to the Intervenors virtually a foregone conclusion. At page 8 of Respondent's brief it is stated that on October 26, 1955 the examiner issued a report recommending approval and on November 28, 1955, the Board heard oral argument and that no recommendation has been sent to the President. It seems safe to conclude and petitioner believes that the Board has already decided the matter favorably to the Intervenors and awaits only a decision on this Petition to submit its decision to the President for approval. Unless the

decision is classified, Respondents could of course confirm or deny petitioner's belief that a final adverse decision has been made by the Board.

Under the *ratio decidendi* of the Waterman Decision there may be no judicial review after the President's action since Executive political discretion is then mixed with questions of evidence or procedure before the Board. *Chicago & Southern Airlines* v. *Waterman Steamship Corp.*, 333 U.S. 103. Petitioner therefore submits that it has exhausted such administrative remedies as are open to him before the Board, that the severing of the major issues by the order finding in favor of the Intervenors was tantamount to a final adverse decision and that in any event if Petitioner does not get a review now, under the *ratio decidendi* of the Waterman decision it will not get any review. As was said in *Cobbledick* v. *U. S.*, 309 U. S. 323 at page 328 analyzing the doctrine of finality as illustrated in *Perlman* v. *U. S.*, 247 U. S. 7:

> "The United States claimed that the action of the district court was 'not final' but merely interlocutory and therefore not reviewable by this court. We rejected the Government's contention. To have held otherwise would have rendered Perlman powerless to avert the mischief of the order . . .".
>
> ". . . to have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his Constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U. S. 541; *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51. Cert. denied 347 U. S. 990.

It is submitted therefore that the paramount question involved is whether the Waterman doctrine should be stretched to permit the denial of a statutory hearing without judicial review and how such an application of the doctrine can be reconciled with the Constitutional prohibition against undue delegation of legislative power by Congress, and the deprivation of property without due process of law. Due process includes a hearing by a tribunal clothed with power to decide. *Morgan* v. *U. S.*, 298 U. S. 468. The Act grants no hearing before the President and according to the dicta of Mr. Justice Jackson in the *Waterman case* (*supra*) the Board has no power to decide.

Conclusion

Wherefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN W. CROSS,
CLAYTON L. BURWELL
Counsel for Petitioner

APPENDIX

Statutory Provisions

The relevant provisions of the Civil Aeronautics Act of June 23, 1938, 52 Stat. 977, as amended by Reorganization Plans 1940, Nos. III and IV, 54 Stat. 1233 and 1235, and Act of May 24, 1949, 63 Stat. 107; 49 U. S. C. 401 *et seq.*, are:

> SEC. 408 (b), 49 U. S. C. 488 (b): Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or aquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5 (8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such

carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

SEC. 801, 49 U. S. C. 601: The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401 (e) or any permit issuable under section 402 (c) or to the original terms, conditions, or limitations of any such certificate or permit.

SEC. 1006 (a), 49 U. S. C. 646 (a): Any order, affirmative or negative, issued by the Authority under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.